INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutes involved 2

Statement 4

Argument 7

Conclusion 10

CITATIONS

Cases:

Amos Treat & Co. v. *Securities and Exchange Commission*, 306 F.2d 260 10

Board of Regents v. *Roth*, 408 U.S. 564 8

Federal Communications Commission v. *WOKO Inc.*, 329 U.S. 223 8

Massachusetts Bay Telecasters v. *Federal Communications Commission*, 261 F.2d 55 10

Office of Communication of the United Church of Christ v. *Federal Communications Commission*, 359 F.2d 994 8

Office of Communications of the United Church of Christ v. *Federal Communications Commission*, 425 F.2d 543 9

Pillsbury Co. v. *Federal Trade Commission*, 354 F.2d 952 9

Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 8

Page

Cases (continued):

Securities and Exchange Commission v. *R.A. Holman & Co.*, 323 F.2d 284 10

South Terminal Corp. v. *Environmental Protection Agency*, 504 F.2d 646 10

Wisniewski v. *United States*, 353 U.S. 901 10

WKAT, Inc. v. *Federal Communications Commission*, 258 F.2d 418 10

WORZ, Inc. v. *Federal Communications Commission*, 268 F.2d 889 10

Statutes:

Communications Act of 1934, Title III, 48 Stat. 1081, as amended, 47 U.S.C. 301 *et seq.*:

47 U.S.C. 301 ..... 2, 8

47 U.S.C. 308 2

47 U.S.C. 308(a) 2

47 U.S.C. 308(b) 3

47 U.S.C. 309 3

47 U.S.C. 309(a) 3

47 U.S.C. 309(e) 3, 8

47 U.S.C. 403 9

47 U.S.C. 405 9

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1246

STAR BROADCASTING, INC., CENTRAL STATES BROADCASTING, INC., AND STAR STATIONS OF INDIANA, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND INDIANAPOLIS BROADCASTING, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The decision of the Federal Communications Commission (Pet. App. 58a-76a) is reported at 51 F.C.C. 2d 95, and the initial decision of the Commission's Administrative Law Judge (Pet. App. 1a-57a) is reported at 51 F.C.C. 2d 114. An earlier decision of the Commission is reported at 40 F.C.C. 2d 623.

JURISDICTION

The judgment of the court of appeals (Pet. App. 77a-78a) was entered on December 11, 1975. A timely

petition for rehearing and suggestion of rehearing *en banc* was denied on January 20, 1976. The petition for a writ of certiorari was filed on March 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission must find that there is "clear and convincing" evidence of broadcaster misconduct as a precondition to deciding not to renew a broadcast license.

2. Whether a decision to deny the renewal of broadcast licenses should be set aside because the Commission did not conduct an investigation to determine whether the decision of former members of the Commission to investigate allegations of misconduct by the licensees had been influenced by congressional pressure.

STATUTES INVOLVED

Title III of the Communications Act of 1934, 48 Stat. 1081, as amended, 47 U.S.C. 301 *et seq.*:

47 U.S.C. 301 provides in relevant part:

> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. * * *

47 U.S.C. 308 provides in relevant part:

> (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: * * *

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. * * *

* * * * *

47 U.S.C. 309 provides in relevant part:

(a) Consideration in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

(e) Hearings; intervention; evidence; burden of proof.

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground

or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * * * *

STATEMENT

Petitioners are licensees of radio stations located in Indianapolis, Indiana; Omaha, Nebraska; and Vancouver, Washington. Each petitioner is a wholly owned subsidiary of Star Stations, Inc. Don W. Burden is chairman, president and owner of 92.3 percent of the stock of Star Stations, Inc. ("Star") (Pet. App. 5a).

After Burden acquired the Indianapolis stations the Commission concluded that they had used an audience

survey rating in a misleading manner and had conducted contests and billed advertisers in an improper manner (Pet. App. 59a-60a). It therefore renewed the stations' licenses for two brief "probationary" periods. The Commission discovered during these probationary periods that other serious misconduct might have occurred in connection with the operation of Star's stations. The Commission accordingly directed that applications for license renewals covering each of the stations be consolidated for a full evidentiary hearing (*ibid.*). The consolidated proceeding also encompassed a competing application for the AM license in Indianapolis (*id.* at 58a).

The initial decision of the Administrative Law Judge concluded that the AM license in Indianapolis should be awarded to the competing applicant and that the other Star licenses should be renewed (Pet. App. 57a). His decision to award one license to the competing applicant was based in large part upon findings that the station had made an illegal campaign contribution by entering into a sham contract for spot political advertisements with no expectation of repayment, and that the station had slanted its news coverage to favor that candidate (Pet. App. 40a, 41a, 56a).

The Administrative Law Judge found that "higher management" was chargeable with knowledge of the distorted newscasts (Pet. App. 41a). He declined, however, to find that Burden was a party to the spot announcement scheme (Pet. App. 40a). He discounted the testimony of the principal witnesses who had implicated Burden (Pet. App. 8a-9a). He acknowledged that other evidence raises "suspicions * * * as to Burden's participation" (Pet. App. 12a) but declared that "the evidence does not support a firm finding that Don Burden was party to or cognizant of the arrangement at the time the spots were broadcast" (Pet. App. 13a).

Similar allegations of an illegal corporate contribution and slanted news reporting by the Vancouver station had been raised with respect to an Oregon Senate campaign. The Administrative Law Judge concluded that the reporting did not violate the fairness doctrine and that the evidence did not establish that the alleged illegal contribution had been made (Pet. App. 16a-20a).

The Administrative Law Judge concluded that Burden had taken steps toward making political contributions to members of a zoning board in order to expedite plans to move the Vancouver stations' transmitter. Burden had withdrawn $10,000 in cash from the corporate treasury to make the contributions, but approval was granted before Burden disbursed the money (Pet. App. 20a). The Administrative Law Judge concluded that this incident has no "decisional significance" because "the record does not reveal what Burden planned on doing with the money" (Pet. App. 44a).

The Commission adopted many of the Administrative Law Judge's findings (Pet. App. 60a). It thoroughly reconsidered, however, the grounds upon which he had discounted the testimony concerning Burden's involvement in his stations' misconduct (Pet. App. 60a-70a);[1] it concluded that Burden was intimately involved and that Burden had perjured himself repeatedly in representing to the contrary (Pet. App. 68a). It also found that Burden endeavored to give one-sided coverage of the

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[1]The Commission's decision to set aside the Judge's factual findings was not based entirely upon a different evaluation of the credibility of the principal witness, Ron Mercer, who had been the general manager of one of Star's stations. It did not uncritically accept Mercer's testimony. Rather, the Commission considered his testimony in light of all the other circumstantial and testimonial evidence and found that Mercer's testimony "comports with" the other evidence "and Burden's denials of involvement in the scheme do not" (Pet. App. 67a).

Oregon Senate campaign, and that his denial that he made a political contribution from the corporate treasury during that campaign is contrary to the weight of the evidence (Pet. App. 68a-70a). Moreover, the zoning incident did have some "decisional significance" in the Commission's view. The Commission found that Burden "undertook a scheme to attempt to influence the action of local officials on KISN's rezoning proposal by contributing $10,000 to their campaign funds; and he took overt steps to complete this scheme" (Pet. App. 71a). Finally, the Commission found that the licensees had engaged in other instances of misconduct (Pet. App. 70a-72a).

The Commission concluded (Pet. App. 72a): "In view of the pervasive and continuing misconduct demonstrated in Burden's operations of his stations, it is clear that Star and Burden lack the requisite qualifications to be licensees of this Commission and that the evidence of record requires the denial of each of Star's renewal applications in this proceeding."

The court of appeals affirmed the Commission's order without opinion. Its *per curiam* order stated that it found "no basis in the record for disturbing the decision of the * * * Commission" (Pet. App. 78a).

ARGUMENT

The decision of the court of appeals is correct. This case does not present any question of general importance requiring review by this Court.

1. The Commission's decision that petitioners do not have the requisite character qualifications to act as broadcast licensees is supported by substantial evidence, and petitioners do not seriously contend otherwise. Instead, they contend that the Commission cannot deny an application to renew a license unless it finds on the

basis of "clear and convincing" evidence that the renewal applicant does not possess the necessary qualifications.

There is no support for this argument in the statute or in any case. Denial of a license renewal application is not a penal measure. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223. It is not a deprivation of "property," because a licensee's right to broadcast terminates when his license expires. 47 U.S.C. 301; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367.[2] Cf. *Board of Regents* v. *Roth*, 408 U.S. 564. When a license expires the applicant for renewal has the burden of demonstrating that the public interest, convenience and necessity would be served by granting to it a license to operate for an additional period. 47 U.S.C. 309(e).

In view of the nature of a renewal proceeding, the application of a "clear and convincing evidence" standard would be inappropriate and contrary to the governing statutes. Cases cited by petitioners (Pet. 12), which adopt such a standard when the government initiates a proceeding to deprive an individual of liberty or property he then enjoys, do not pertain to renewal applicants; a renewal applicant does not have a "right to renew" that can be "extinguished" only under limited circumstances.

Petitioners' assertion that the difference between a decision to revoke a license during its term and a decision not to renew a license is a matter of "form, not substance" (Pet. 14) misconceives the nature of

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[2]The Chief Justice has observed: "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; * * * a broadcast license is a public trust subject to termination for breach of duty." *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 359 F.2d 994, 1003 (C.A. D.C.).

a renewal proceeding and runs afoul of the statutory requirement (47 U.S.C. 301, 309(a) and (d)) that a renewal applicant has the burden of proof. See *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 425 F.2d 543, 549-550 (C.A. D.C.).

2. Petitioner alleges (Pet. 15) that the Commission's decision may have been infected by the notoriety engendered by congressional interest in the Commission's 1969 "probationary" license renewal of WIFE and WIFE-FM. This is nothing but speculation. After the Commission granted the probationary renewal in 1969 (19 F.C.C. 2d 991), it declined to comply with a congressional subpoena of the Commission's records. The Commission believed that the subpoena was premature, for the proceeding was still in an adjudicatory posture and subject to reconsideration. 47 U.S.C. 405. By resisting this subpoena the Commission successfully maintained the integrity of its administrative proceeding and avoided the type of improper congressional intrusion found to exist in *Pillsbury Co.* v. *Federal Trade Commission*, 354 F. 2d 952 (C.A. 5).

After the statutory period for reconsideration had expired, the Commission's staff presented to the Commission additional information (developed during the earlier hearing) that reflected on Star's qualifications to operate its stations. Congress initiated its own investigation of Star, and the Commission conducted both informal and formal investigations. 47 U.S.C. 403. The Commission ultimately commenced the present renewal hearing. Members of the Commission's staff who had coordinated matters with the congressional inquiry have taken no role in the renewal proceedings. There is simply no reason to suppose that the outcome of the present proceedings had been influenced by the earlier congressional interest, and a

formal hearing on this question was unnecessary.[3] Cf. *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 675 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
Attorney.

ASHTON R. HARDY,
General Counsel.

DANIEL M. ARMSTRONG,
Associate General Counsel.

SHELDON GUTTMANN,
Counsel,
Federal Communications Commission.

MAY 1976.

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[3]Petitioners' reliance on cases such as *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d 260 (C.A. D.C.); *Securities and Exchange Commission* v. *R.A. Holman & Co.*, 323 F.2d 284 (C.A. D.C.); *WKAT, Inc.* v. *Federal Communications Commission*, 258 F.2d 418 (C.A. D.C.); *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F.2d 55 (C.A. D.C.); and *WORZ, Inc.* v. *Federal Communications Commission*, 268 F.2d 889 (C.A. D.C.), is misplaced. In each of those cases allegations were raised concerning improper contacts with a Commissioner participating in a particular proceeding. Petitioner does not claim that it has evidence of any improper contact with a Commissioner. Moreover, if such a contact had occurred at the time of the congressional investigation it could not have affected the validity of the Commission's decision to deny the renewal applications. None of the Commissioners who voted to deny renewal was a member of the Commission at the time of the congressional investigation. In any event, any conflict among decisions of the same court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.